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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. ~~827~~ 89

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

v.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchinson, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ARTHUR M. BOAL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EASTERN STEAMSHIP LINES, INC., a general agent of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 29, 1948.

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 170 F. 2d. 882 (Record 341).

Jurisdiction.

The judgment of the Court of Appeals was entered on December 29, 1948 (Record 357). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The time for presenting this petition was extended to May 2[illegible], 1949.

Questions Presented.

The question presented is whether after the effective date of the Clarification Act of March 24, 1943, petitioner, a private steamship company, employed by the United States as its agent, and not as an independent contractor, to manage and conduct the accounting and certain other shore-side business operations of government vessels, is liable for the death of a member of the crew of such a vessel caused by the negligence of another member of the crew.

Statutes Involved.

The statutes involved are the War Shipping Administration (Clarification) Act (57 Stat. 45; 50 U. S. C. App. 1291), the Jones Act (41 Stat. 1007; 46 U. S. C. 688), the Federal Employers' Liability Act (35 Stat. 65, as amended; 45 U. S. C. 51) and R. S. 1753 (5 U. S. C. 631).

Statement.

The *S.S. Francis Amasa Walker* was a Liberty vessel owned and operated by the United States. The petitioner was the ship's husband or general agent under the Wartime standard form of service agreement. The Respondent's

> "Intestate was a boatswain on that vessel who received fatal injuries on February 1, 1945, while performing his duty in attempting to carry out an order to tighten a guy wire, a part of the torpedo net defense equipment of the ship which had been installed by the United States Navy and was maintained by the Navy."

* * * * * *

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> "This equipment consisted of two heavy steel nets which were, when being used for protection from torpedoes, suspended over and along each side of the ship at a suitable distance and lowered into the water. The rigging by which they were thus moved and held in place included four booms, eight heavy steel guywires with turnbuckles and six stanchions. When the ship was loading or discharging cargo these nets with their rigging would have interfered with the work if kept in protective position. They had therefore been dismantled in port sufficiently to permit the vessel to load, and the decedent was fatally injured while at work preparing them to be put in protective position after the vessel was again at sea."

The respondent's intestate, while attempting to tighten the turnbuckle turned it the wrong way and the screw came out of the turnbuckle. Respondent's intestate lost his balance and fell to his death.

The Court of Appeals held that there was evidence from which the jury could have found that the eye bolt which came out of the barrel of the turnbuckle was defective, and

> "But the gear had been on the ship for at least one previous voyage across the Atlantic and back and it had been inspected by a mate who then knew, or should have known, that the turnbuckle was defective in the respects here shown and whose knowledge is attributable as a matter of law to the appellant."

Then the Court said:

> "On the second issue we hold that the appellant, as the operating agent of the vessel, is not immune from suit because of the provisions of the Clarification Act, *supra*, and do so for the reasons stated in our recent decision in *McAllister* v. *Cosmopolitan Shipping Co.*, 2 Cir., 169 F. 2d 4."

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that petitioner was chargeable with knowledge that the ship's gear was defective.

2. In holding that petitioner was liable for the negligence of an employee of the United States, a member of the crew of the *S.S. Francis Amasa Walker.*

3. In following its own decision in *McAllister* v. *Cosmopolitan Shipping Co.,* 169 F. 2d. 4, in which this court had already granted a writ of certiorari.

4. In affirming the judgment of the district court holding the petitioner liable to the respondent.

Reasons for Granting the Writ.

The issue presented by this case is whether a civil service employee of the United States, a member of the crew of a merchant vessel owned and operated by the United States may recover for injuries received while serving on board such vessel in a suit against the ship's husband or shoreside agent as if the latter were the employer. The court below, basing its decision on its own holdings in *McAllister* v. *Cosmopolitan Shipping Co., Inc.,* 169 F. 2d. 4, has held that he may. The issue presented by this case is identical with those in the *McAllister* case, *Gaynor* v. *Agwilines, Inc.,* 169 F. 2d. 612 (C. C. A. 3) and *Fink* v. *Shepard S. S. Co.,* 192 P. 2d. 258 (Ore.) rehearing denied, 193 P. 2d. 537. The holding of the court below is in direct conflict with the *Gaynor* and *Fink* cases. We submit that it is clearly wrong.

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This court granted certiorari on November 22, 1948 in *Cosmopolitan Shipping Co., Inc.* v. *McAllister* (No. 351), *Fink* v. *Shepard S. S. Co.* (No. 360), and *Gaynor* v. *Agwilines, Inc.* (No. 162). These three cases were argued before this court on February 1-2, 1949 but no decision has as yet been handed down.

1. The decision of the court below permits recovery in a case arising subsequent to the Clarification Act. (War Shipping Administration (Clarification) Act of March 24, 1943 c.26, 57 Stat. 45, as amended (50 U. S. C. App. 1291)). The decision was based on the same court's holding in *McAllister* v. *Cosmopolitan Shipping Co., Inc., supra,* which was admittedly in conflict with the decision of the Supreme Court of Oregon in *Fink* v. *Shepard S. S. Co., supra,* and is also in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Gaynor* v. *Agwilines, Inc., supra.*

The court below in the *McAllister* case relied on the reasoning of this court in *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, although it recognized that the opinion in that case expressly disclaimed any intention of dealing with liability for acts of negligence occurring subsequent to the passage of the Clarification Act.

Seamen employed on Government vessels during the war were civil service employees of the United States. It was the intent of Congress when it gave Government seamen the right of privately employed seamen to restrict the endorsement of these rights to suits in Admiralty against the United States. The rights were to be measured by those of seamen in private employment rather than by those of other civil service employees of the Government However, the seamen in question remained civil service employees of the United States. The context of the Act

and its legislative history clearly exclude any notion that the seamen were regarded by Congress as employees of the general agent. See *Gaynor* v. *Agwilines, Inc.*, 169 F. 2d. 612 at 615. The Clarification Act would have been unnecessary had Congress regarded the seamen as employees of the agent since, had they been, they would have had the right to recover from the agent under the Jones Act without any further legislation. As stated by the Supreme Court of Oregon in the *Find* case:

> "It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment (192 P. 2d. at 268)."

2. Third persons other than seamen could not recover against the general agent under similar circumstances. See *Caldarola* v. *Eckert*, 332 U. S. 155, *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575; *Publicker Commercial Alcohol Co.* v. *American-Hawaiian S. S. Co.*, 165 F. 2d. 1002, 1006 (C. C. A. 3); *Dichmann, Wright & Pugh* v. *Weade*, 168 F. 2d. 914 (C. C. A. 4), certiorari granted October 11, 1948, No. 179; *McGowan* v. *J. H. Winchester Co.*, 168 F. 2d. 924 (C. C. A. 2), certiorari denied November 8, 1948, No. 311; *Palardy* v. *American-Hawaiian S. S. Co.*, 169 F. 2d. 619 (C. C. A. 3). United States Courts of Appeal have also held that the general agent is not liable as employer to the seamen for wages. *Aird* v. *Weyerhaeuser S. S. Co.*, 169 F. 2d. 606 (C. C. A. 3); *Shilman* v. *United States et al*, 164 F. 2d. 649 (C. C. A. 2), certiorari denied February 16, 1948, 333 U. S. 837.

However, confusion exists and a conflict of decision has arisen in the lower courts with respect to the rights of the Government's employees to recover against the general agents for torts. These questions require settlement by this court.

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3. In addition to the court below, in holding petitioner liable for the negligence of intestate's fellow civil service employee in doing work of the United States which was not subject to the petitioner's control or direction, failed to take account of this court's decision in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, 584, 585, *Denton* v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308-309 and *Caldarola* v. *Eckert*, 332 U S. 155, 159.

Under settled principles the liability of the ship's husband or shore-side busines agent is limited to the torts of those who are doing the work of the agent in attending to such shore-side business. The possible conflicts between the *Hust* and *Caldarola* cases as to whether or not a cause of action against the shore-side agent has been established constitute a matter for determination by this court.

4. The importance of the case extends far beyond the question of the injured man's forum or the extent of his recovery. There are serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments. In war time there are also serious questions as to the security of information regarding ship movements and operations.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

May, 1949.

ARTHUR M. BOAL,
Counsel for Petitioner.